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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re HENRY GARCIA, on Habeas Corpus.	A128155

On March 25, 2009, the Board of Parole Hearings (Board) decided not to set a release date for convicted murderer Henry Garcia. After the San Mateo Superior Court declined to issue a writ of habeas corpus setting aside that decision, Garcia initiated this original proceeding for the writ. The basis for his petition—as it was in the superior court—is that Penal Code section 3041 (section 3041) and title 15, section 2402 of the California Code of Regulations (regulation 2402) require his release because there is no evidence to support the Board's decision and demonstrate that his parole would pose an unreasonable risk of danger to the public safety.

The legal principles governing that decision were recently explained by our Supreme Court:

"[T]he parole suitability statutes 'provide that the Board is the administrative agency within the executive branch that generally is authorized to grant parole and set release dates. [Citations.] The Board's parole decisions are governed by section 3041 and [regulation 2402] [citation]. Pursuant to statute, the Board "shall normally set a parole release date" one year prior to the inmate's minimum eligible parole release date, and shall set the date "in a manner that will provide uniform terms for offenses of similar gravity and magnitude *in respect of their threat to the public* . . . ." (§ 3041, subd. (a),

italics added.) Subdivision (b) of section 3041 provides that a release date must be set "unless [the Board] determines that the gravity of the current convicted offense or offenses, or the timing and the gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." ' [Citation.]

"[Regulation] 2402 . . . sets forth the factors to be considered by the Board in implementing the statutory mandate. This regulation is designed to guide the Board's assessment of whether the inmate poses 'an unreasonable risk of danger to society if released from prison' and thus whether he or she is suitable for parole. [Citation.] The regulation lists several circumstances relating to unsuitability for parole (such as the heinous, atrocious, or cruel nature of the crime, or an unstable social background) and several circumstances relating to suitability for parole (such as an inmate's rehabilitative efforts and demonstration of remorse, and the mitigating circumstances of the crime). [Citation.] Finally, the regulation explains that the foregoing circumstances 'are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel.' [Citation.] The Governor's power to review a decision of the Board is set forth in article V, section 8, subdivision (b) of the California Constitution.

" '[T]he governing statute provides that the Board must grant parole unless it determines that public safety requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction. [Citation.] And as set forth in the governing regulations, the Board must set a parole date for a prisoner unless it finds, in the exercise of its judgment after considering the circumstances enumerated in section 2402 of the regulations that the prisoner is unsuitable for parole. [Citation.] Accordingly, parole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.' [Citation.]

"In sum, the statutes and governing regulations establish that the decision to grant or deny parole is committed entirely to the judgment and discretion of the Board, with a constitutionally based veto power over the Board's decision vested in the Governor. Nevertheless, . . . courts are authorized to review the merits of the Board's or the Governor's decision to grant or deny parole . . . . [T]he Board and the Governor must consider the statutory factors concerning parole suitability set forth in section 3041 as well as the Board regulations [citation], and that 'because due process of law requires that a decision considering such factors be supported by some evidence in the record, . . . [the Board's] decision is subject to judicial review to ensure compliance with this constitutional mandate.' [Citation.]" (*In re Prather* (2010) 50 Cal.4th 238, 249-251, fns. omitted.)

This court has repeatedly held that "the exceedingly deferential nature of the 'some evidence' standard does not convert us ' "into a potted plant." ' We must ensure that the denial of parole is based on 'some evidence' of current dangerousness.' '[S]uch evidence " 'must have some indicia of reliability.' " ' '[T]he "some evidence" test may be understood as meaning that suitability determinations must have some rational basis in fact.' " (*In re Juarez* (2010) 182 Cal.App.4th 1316, 1337, quoting our decisions in *In re Scott* (2004) 119 Cal.App.4th 871, 898, 899, and *In re Scott* (2005) 133 Cal.App.4th 573, 590, fn. 6.) "However, in determining whether 'some evidence' supports the Board's . . . decision, we must consider not only the self-selected portions of [an inmate's] testimony, but the record as a whole." (*In re Shippman* (2010) 185 Cal.App.4th 446, 459.)

Petitioner was convicted of the second degree murder of his wife Diana in 1979. Although the details are not established with crystal clarity by the record, it appears that petitioner walked up to his wife on the street, stabbed her a number of times, and then turned himself in to police. He was 36-years-old at the time. He was 66 at the time of the Board hearing in March 2009.

At first glance, petitioner seems to be an ideal candidate for parole. As one of the Board members stated at the hearing to petitioner, "You have stayed disciplinary free throughout your entire incarceration with one small exception . . . [in] March 1999." In

1984 petitioner completed the requirements for a bachelor's degree from San Jose State University. He has received several "laudatory" evaluations while working in the prison laundry. He has received certifications as a "Laundry and Linen Manager" and "Laundry Operator." His "post release plans" are described as "realistic," "feasible," and "adequately encompassing."

The Comprehensive Risk Assessment and psychological report prepared for the hearing by Michael Venard, Ph.D., was optimistic about petitioner's ability to avoid re-offending if paroled:

"In the Clinical or more current and dynamic domain of risk assessment, Mr. Garcia displayed none of the predictive factors for recidivism. He has no active symptoms of a major mental illness. During this interview, he displayed considerable insight into his former personality style, as well as the contributing factors to the instant offense. He appears to have integrated the lessons learned from various self-help programs into his daily routine in a credible manner as means of preventing future difficulties with intoxicating substances or problematic relationships in the community. He has been responsive to the treatment that has been available to him and remains positive about his progress and hopes for the future. He communicated no attitudes or values that were pro-criminal in nature. Additionally, he has a demonstrated history of self-control, as indicated by the absence of any Rules Violation Reports or repeated Custodial Counseling Chronos across his incarceration. All reports that he is both emotionally and behaviorally stable.

"Risk Management . . . identified minimal concerns for future risk of dangerous behavior. Mr. Garcia's prospective plans for parole are feasible and adequately encompassing. . . . He has taken steps to align with job placement programs and he has marketing skills that will likely assist him in finding employment quickly. He plans to continue his participation in AA in the community, which should minimize his exposure to the destabilizing effects of drugs and alcohol. He appears to have adequate emotional support from family members and friends in the community, as well. Mr. Garcia expressed doubts he would marry again in the future. Nevertheless, he described a need

for 'better communication and less jealousy' if he did happen to become involved in any future relationship."

Nevertheless, Dr. Venard did sound several cautionary notes. He observed that a previous evaluation cited petitioner's "history of increased alcohol consumption 'when he was working . . . and arguing frequently with his wife.' . . . Records from the San Bruno Police department cite an interview with a friend of his ex-wife's that indicate Mr. Garcia was drunk and chased his ex-wife. According to those same records, Mr. Garcia's stepdaughter . . . told police Mr. Garcia 'tried numerous times to quit drinking but he never did.' " Petitioner described to Dr. Venard "the history of conflict between he [*sic*] and his wife, admitting that he chased her at one point previous to the life crime." Still, Dr. Venard concluded that "alcohol or drugs played no significant role in the life crime." He further noted that petitioner felt "increasingly jealous of his wife," and was unwilling accept that his marriage was finished. These considerations apparently were behind Dr. Venard's caution that "Mr. Garcia's risk of violent recidivism would likely *increase* if he returned to use of alcohol as a stress coping mechanism AND once again became involved in a 'troubled' relationship."

Administrative preliminaries aside, the Board hearing started with petitioner being asked if he had any disagreements with a summary of the crime read for the record.

After petitioner responded with "Yeah," the following occurred:

"PRESIDING COMMISSIONER ANDERSON: That's a summary. Now, I read your statement, and this is your latest statement, and I'm going to allow you to expand on it, if you will. You talked about what happened. She passed you on the street. You waved at her. She didn't acknowledge you. You followed her to the parking lot, and that's where the stabbing occurred. Now, what I'd like to talk about, you tried to engage her in conversation, and I guess she ignored you, and she was late for work. You said that you did not realize you had stabbed her until you saw her eyes roll back and saw blood coming from the wounds that you inflicted in her upper torso. Can you explain that for me, sir?

"INMATE GARCIA: Well, when I went there, my anxiety level was very high, you know, the marriage problem that we had been having.

"PRESIDING COMMISSIONER ANDERSON: Okay.

"INMATE GARCIA: Of course, you know, it's very hard for me to cope with, and the error I made was that I wanted—I didn't want to let my marriage go, and I was adamant in trying to talk Diana into going to see her father that morning because I knew he was home at that time.

"PRESIDING COMMISSIONER ANDERSON: Okay.

"INMATE GARCIA: And when she passed me by on North Street, where I was waiting for her because I thought we could get back on El Camino and go back up to where her father lived on Sanchez Street. At that particular time I think that's when it really, really hit me that I was out of control. I mean, I didn't realize it then, but I do now that that's when it was because—

"PRESIDING COMMISSIONER ANDERSON: When you say out of control, were you out of control with your emotions?

"INMATE GARCIA: Emotions, yeah.

"PRESIDING COMMISSIONER ANDERSON: Anger?

"INMATE GARCIA: My anxiety level was up, and when Diana passed me, because I was going to talk to her because I thought we could get right back on El Camino and go see her father, and when she passed me there, my anger level went up, and I started following her, and when I got there to the parking lot, I was—I talked to Diana. I says, Diana, you know, wait a second, you know, and she came at me. And she goes I'm late for work. Here, you know, and she hit me with the—with the—just placed some letters right here kind of just to slap—here's your letters.

"PRESIDING COMMISSIONER ANDERSON: Letters of what?

"INMATE GARCIA: Well, of mail that—because I didn't stay there that night.

"PRESIDING COMMISSIONER ANDERSON: That you had mailed to her?

"INMATE GARCIA: No, no.

"PRESIDING COMMISSIONER ANDERSON: Or, your mail?

"INMATE GARCIA: That was mailed for me.

"PRESIDING COMMISSIONER ANDERSON: Oh, from the residence?

"INMATE GARCIA: Yeah, from the house.

"PRESIDING COMMISSIONER ANDERSON: Okay.

"INMATE GARCIA: And she goes here's your mail. She hit it there, and that's just when—I don't know, I just—that's when I exploded. It's from—it was from all the frustration, anxiety, and all the hurt and pain that I was under, and it just—from—from the years of the marital problems that we had been having, that's when I exploded, and the next thing I knew is I'm getting up and Diana's lying down there, and her eyes are rolling back, and I just panicked, and I just left.

"PRESIDING COMMISSIONER ANDERSON: So you—okay. What kind of a knife was it?

"INMATE GARCIA: It was a three-inch knife that I used for (inaudible).

"PRESIDING COMMISSIONER ANDERSON: It's a—it was a folding knife, right?

"INMATE GARCIA: Yes.

"PRESIDING COMMISSIONER ANDERSON: So you had to open it up?

"INMATE GARCIA: Right.

"PRESIDING COMMISSIONER ANDERSON: You don't remember opening it up?

"INMATE GARCIA: No.

"PRESIDING COMMISSIONER ANDERSON: The knife?

"INMATE GARCIA: Well, see. That knife I use, see—when I was working at PG&E, and of course I used that knife daily, maybe 10 or 15 times cutting twine that the cables are tied down with or dusting cables or twine that ties stuff down. I'm always cutting something.

"PRESIDING COMMISSIONER ANDERSON: Okay. Okay, so she got five wounds, five stab wounds.

"INMATE GARCIA: Right.

"PRESIDING COMMISSIONER ANDERSON: You're in close proximity, enough to get blood on you, and you don't remember that. And then you stepped away. . . ."

And at a later point of the hearing:

"PRESIDING COMMISSIONER ANDERSON: . . . [L]et's just put this together so I can understand it clearly. Your motivation was one of—let's say you were jealous?

"INMATE GARCIA: Yes, I was. I was jealous to a certain extent.

"PRESIDING COMMISSIONER ANDERSON: Okay, So you—your motivation for committing this crime was the fact that you were having marital difficulties. Was your wife going to leave you?

"INMATE GARCIA: I believe—

"PRESIDING COMMISSIONER ANDERSON: Were you still together?

"INMATE GARCIA: I believe so. Well, no, no. We separated right then. I think it was—

"PRESIDING COMMISSIONER ANDERSON: Okay.

"INMATE GARCIA: —the Monday before.

"PRESIDING COMMISSIONER ANDERSON: So now—

"INMATE GARCIA: And that happened on a Friday.

"PRESIDING COMMISSIONER ANDERSON: —you have any difficulties, and you're knowing her route. You see her. You try to flag her over or whatever. So you motivation for approaching—well, let me go even farther. Your motivation was one of anger? Anger towards her? What was—

"INMATE GARCIA: Well—

"PRESIDING COMMISSIONER ANDERSON: Well, how do you explain it?

"INMATE GARCIA: Well, the way I was feeling is my—the reason I went off is that I made—I—I blamed Diana for all my troubles on that. [¶] . . . [¶] I seen her as—as the one—and that was wrong, of course. [¶] . . . [¶] You know, but at that time I wasn't thinking clear. My mind was occupied. I didn't want to lose my family. I didn't want to

lose my daughters. I didn't want to lose my wife. I didn't want to lose my home, and that was the main thing in my head.

"PRESIDING COMMISSIONER ANDERSON: What have you done to deal with the factors that led you to commit the crime against Ms. Garcia?

"INMATE GARCIA: You mean the self-help groups.

"PRESIDING COMMISSIONER ANDERSON: Yeah, self-help. Have you taken self-help classes?

"INMATE GARCIA: Yes, I have.

"PRESIDING COMMISSIONER ANDERSON: And things like that . . . . I just want to put on the record that you've done something about those feelings of anger, striking out.

And then later:

"PRESIDING COMMISSIONER ANDERSON: It says here—it says here you have a history of domestic violence.

"INMATE GARCIA: Pardon me.

"PRESIDING COMMISSIONER ANDERSON: The last Board said you had a history of domestic violence. Do you have a history of domestic violence?

"INMATE GARCIA: Well, you know, I did threaten Diana with a knife on one occasion, and that was unfortunate. I was wrong in that—

"PRESIDING COMMISSIONER ANDERSON: Okay.

"INMATE GARCIA: —that instance, and at another—in another incident I did push Diana in a hallway, but other than that, I don't recall any of the—any further—"

Petitioner described "a progressive muscle relaxation technique" he had been taught in 1994, and then stated: "The other—the other thing that I think that helps me now, of course, is my age. I think my age is a—I think I've kind of matured out. I don't—I don't try to tell people anything. I try to just listen and kind of put myself in other people's shoes to try to figure out, you know, how they feel and see their perspective, which is—which is what I—I really should have used. If I'd had the technique when I was living with Diana, I wouldn't have been here. I didn't use that.

I—you know, I never thought I was controlling until this last—at the last hearing, and after I read the transcripts, and I—and that, I thought to myself, you know what? I—I did try to control things, you know, because here I am, you know, I sit here, and I'm thinking, put yourself in another person's shoes, and I go, and I'm reading these transcripts, and I'm going I never put myself in Diana's shoes. I didn't even try to see—and Diana had every right to find whatever . . . she was looking for. If she wanted to leave, she had every right to do that. And I didn't see that. I was only thinking of myself at that time, and I was selfish, and if I'd known that, it would never have happened." Petitioner answered a question from Commissioner Anderson by admitting that on the morning of the murder "I had taken just a sip of beer."

The matter of petitioner's "last hearing" was briefly addressed by the other member of the Board, Deputy Commissioner Facciola, in the course of reviewing petitioner's subsequent efforts: "Your last Board, or your last hearing was March 23, 2007. And at that hearing the Board recommended that you . . . explore the root causes of the commitment offense and stay disciplinary free." Petitioner completed a stress management program in 2008.

Addressing Dr. Venard's report, Commissioner Anderson noted: "In there there's some interesting passages where Mr. Garcia expressed doubts he would marry again in the future. Nevertheless, he described a need for better communication and less jealousy if he did happen to have relationships . . . . He does note though that your risk of violent recidivism would likely increase if you returned to the use of alcohol as a stress-coping mechanism and once again became involved in a troubled relationship."

San Mateo Deputy District Attorney Wagstaffe asked petitioner whether he had stalked his wife prior to killing her. Petitioner replied that he had not, but he did concede that his actions prior to the murder could be construed as stalking. Petitioner admitted that on the morning of the murder "I stopped by a 7-Eleven . . . and I bought a beer, and I took a sip out of it, but . . . it just didn't taste good, so I threw it away, and went back in and got a cup of coffee." At the urging of his attorney, petitioner discussed his feelings of remorse.

The Board then heard closing statements from the district attorney and petitioner. Mr. Wagstaffe argued as follows:

". . . I start off by telling you that I believe that's a—the defendant is not yet suitable despite the fact that it's been a lengthy stay. It's been 30 years, and I know that, but I do want to say that I saw something different today than I have in all the hearings I've been to since I first started attending hearings approximately 20 years ago. . . . I thought he showed today that he listened the last time to Ms. Bryson [one of the panel at the 2007 hearing] when she spoke because he said something today that he had never said. Despite the fact that it had been commented on, probably by me and others over those—these hearings, and that was something, I made a note of it, because when I heard it, I said that's a positive step. When he made the comment that he never thought he was a controlling person until the last parole hearing when he read the transcripts, but Ms. Bryson, very explicitly went through with him to tell him that you really are a stalker for what you did back then, and you really were a controlling person. He had always—and to that I think that's a positive step, and to that I'm—again, I'm here trying to say what my concern would be in representing the people of my county, and that is that that's a positive step, but it is a two-year step. It is the beginning. I have for years argued this man doesn't have the insight into what he did, and he's got to work to get it. There is—and this was a sign of something that he has taken that step, but there are additional steps, and that is just two years. After 32 years he finally is beginning to see . . . what he did. He made another comment though, that gives me some cause for concern . . . when he said in response to one of your questions, he made the comment that he was 'jealous to a certain extent.' Well, . . . he's never acknowledged that before. But that's not as far as it was. It wasn't jealousy to a certain extent. This was insane jealousy. I think the probation officer . . . 30 years ago in analyzing the crime made the comment that the defendant felt his wife perhaps was in an extramarital relationship and that he was extremely paranoid and domineering in his wife's activities . . . . [I]t was a domestic violence, and it was a controlling, jealous relationship . . . . He's had anger training, and that's good, but I'm not sure he—he really ought to write for some material. That

material's available out there. Every one of the people we send to the [domestic violence counseling] program gets extensive materials on insight into domestic violence and jealousy. I think he was more than just that. . . . [A]ccording to the probation officer the catalyst for this crime in the end what ignited it, the match was that wave. When she didn't return his wave. A woman who was trying to get away from him. The other obvious matters that are before you, and that is that it took you to bring out in your question, when he said that yeah, there would be some stress and tension in the relationship, but you took you to bring out the fact that he had actually pushed her, and on another occasion brandished a knife. Remarkably serious things in light of what ultimately came. To simply initially say no, and we had our problems and ups and downs, but nothing—oh, there were these two events. Again, that's good. He's looking, but boy, he needs to get some insight on that. He needs to think about that and reflect on it that this wasn't just sort of a difficult marriage, going through a tough patch that all relationships do. It was on a path obviously with that type [of] prior violence, and there was more than that . . . and it was mentioned by the Board at the last hearing about the ongoing violence that was occurring in the relationship. It causes me to say that . . . my concern is . . . our danger of recidivism. If we could look [*sic*] him in . . . an environment where there are no women, . . . maybe it would be our option, but we can't do that, nor is that what we should do."

Mr. Wagstaffe further argued that Dr. Venard's report was generally "very positive," but it "has . . . points where it minimizes the [role of] alcohol. And of course, somebody who's buying alcohol in the morning to wet the lips, . . . there was an alcohol problem in that relationship," and petitioner "needs to keep working and realize it." Petitioner needed more time to "work through" and internalize the 12 steps of Alcoholics Anonymous "before you and I should feel secure that he should come back and live in any county. . . . I want to feel secure on behalf of the people of San Mateo County . . . that we can feel that he's made progress on understanding that insight. From what Ms. Bryson said at the conclusion of the last hearing, he has taken a couple of small steps. There are many more to take."

Not unnaturally, petitioner's counsel laid principal stress on Dr. Venard's report, particularly his conclusion that petitioner did not represent "a danger to society" if paroled. Counsel underscored this conclusion by demonstrating that the same conclusion was found in psychological reports going back to 1989. In short, the murder was a one-time consequence of unbearable domestic fears and pressures that would never have happened "if he had the tools that he learned here," and which "will never happen again, based upon [what] he's learned through his time here."

In his statement to the Board, petitioner made several concessions, that "as far as the jealousy is concerned, what Mr. Wagstaffe said was true," and that "as Mr. Wagstaffe said, I didn't think I was that controlling, but I was." But "I'm not the way I used to be. I don't put myself in a risk situation."

The Board then heard from the victim's daughter, petitioner's step-daughter, who adamantly opposed parole. "He has no remorse at all," and all he said to the Board was "lies." "What good has this so-called counseling and years of AA done for him if he still cannot tell the truth about his alcohol abuse, mental and physical abuse [of] my mom . . . . He cleverly hides his hidden rage, but behind that cold hearted face he today is the same man who over and over stabbed his wife and mother of three young daughters to death, . . . and he still shows no remorse." "I'm sure Mr. Garcia remembers when he would come home intoxicated. My mom and I would sneak out the bedroom window in the middle of the night. I remember the bushes we would hide in, and I heard that car that . . . [had] been fixed up and remodeled and ready for him. That Firebird. The noise, the sound, it was loud. And he would go up and down the street looking for her."

After recessing for 30 minutes to deliberate, Presiding Commissioner Anderson announced that petitioner would not be paroled. This decision was based on two factors. The first was the nature of the murder: "This commitment offense is one that is an atrocious and cruel crime. We're talking about a victim here that was vulnerable, a victim who had a special relationship with the inmate in that he was her husband . . . . The offense was carried out in a manner which demonstrates an exceptionally callous

disregard for human suffering . . . . You can even say this is a lie-in-wait kind of offense because he was there waiting for the victim."

"There is indication that he had an alcohol issue, but he's addressed any alcohol issues by ongoing participation in AA. But here's where it's problematic for the Board, with respect to his past and present attitudes towards the crime. When questioned, and when you go back to prior transcripts and even today, Mr. Garcia, you've never stated you stabbed the victim . . . . You've never made that statement in any of these documents here. We know the victim died of five stab wounds, and you say you can't remember, and I gave you ample opportunity to come together with that causation factor. You can't remember. And that's part of insight. That is connected to insight an *In re Shaputis* query establishes that the inmate must have insight into the causative factors, clear insight into the causative factors. With respect to a grant of parole the Board is allowed to look at that. And we do look at that extensively. That is probably the primary reason for your denial, is you need to develop more insight into the causative factors. Also, . . . you have not addressed the issue—at least officially for this Board of jealousy . . . . [T]he district attorney talked about it. One of your issues is controlling . . . . [Y]ou're a controlling person. And . . . you've been doing some extra work with psychologists on addressing these issues, but the Board has an issue with how this crime was committed was the fact that you were a controlling person, and the Board is not clear that this is sufficiently addressed at this time. We believe your gains are recent in terms of addressing controlling aspects of this. How are you going to . . . you know, it's not realistic to say you'll never be involved in relationships with women again. That's not realistic. What is realistic is to address the causative factors that allowed you to commit this commitment offense in the first place. That's realistic. There's always women. Women are a part of the world . . . . [S]o that's what needs to be addressed, is how did you develop such anger and jealousy that allowed you to do this crime? That's what you need to work on."

Presiding Commissioner Anderson further stated: "We still would like—the Deputy Commissioner and I had some discussions about your remorse, and we would like you to continue to work on that." Deputy Commissioner Facciola added: "I would

encourage you to seek information and programming regarding domestic violence and spousal abuse. There are correspondence courses and support groups available to you. You still are asking yourself the same questions we are about how and why." Presiding Commissioner Anderson ended the hearing by telling petitioner, "while we want to commend you for the positive aspects of your case, which we've already discussed in great detail, the circumstances that make you unsuitable for parole . . . heavily outweigh the positive aspects of your case, and after weighing all the evidence presented here today, you are unsuitable for parole because you remain a present risk of danger if released and require an additional three years of incarceration."

One of the circumstances enumerated in regulation 2402 as "Circumstances Tending to Show Suitability" is that "The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense." (Reg. 2402(d)(3).) Proof that an inmate "has failed to gain insight into . . . the commitment offense" amounts to the "some evidence" that will support a denial of parole. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1246, 1260; *see In re Rozzo* (2009) 172 Cal.App.4th 40, 60-63.) And in the companion case to *Shaputis*, the Supreme Court stated that "In some cases, such as those in which the inmate . . . has shown a lack of insight or remorse, the aggravated circumstances of the commitment offense may well continue to provide 'some evidence' of current dangerousness even decades after commission of the offense," or "even after many years of incarceration." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1228.)

We recently held that " '[L]ack of insight' is probative of unsuitability only to the extent that it is both (1) demonstrably shown by the record and (2) rationally indicative of the inmate's current dangerousness." (*In re Calderon* (2010) 184 Cal.App.4th 670, 690.) Petitioner cannot deny the existence of his jealousy, his tendency towards domestic violence, or his controlling nature, given that he admitted them at the hearing. The utility and efficacy of the anger management course petitioner completed would be severely reduced unless he is aware of the causes of his anger. The Board in 2007 had

recommended that petitioner "explore the root causes" of why he murdered his wife, but little of that exhortation seems to have been absorbed and acted upon.

The Board could conclude that petitioner has not yet truly internalized his crime. He conceded only that "I was jealous to a certain extent," when that motive appears to have been driving his homicidal rage. Petitioner elided giving a straight answer to Presiding Commissioner Anderson's direct question "Do you have a history of domestic violence?" Dr. Venard noted in his report the brick wall put up by petitioner: "*During this interview* Mr. Garcia said he had not harmed his wife" while they were married. As evidenced by Presiding Commissioner Anderson's comments at the end of the hearing, the Board clearly had major reservations about petitioner's evasiveness and lack of self-awareness. These issues of credibility are vested in the Board alone. (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677; *In re Burdan* (2008) 169 Cal.App.4th 18, 28.)

Petitioner told the Board that the question of whether he was a controlling personality only occurred to him after the Board raised the issue at the previous hearing in March 2007. Yet his only proffer of progress to address it was the "progressive muscle relaxation technique" he had been taught back in 1994. With respect to his controlling personality, the Board told petitioner that "your gains are recent" and "not . . . sufficiently addressed at this time." Inferential support for this conclusion may be gleaned from the complete absence in Dr. Venard's report of this feature of petitioner's personality, which certainly suggests that petitioner did not raise the issue with the psychologist.

On the other hand, Dr. Venard did anticipate the scenario that also concerned the Board. Both were fearful of the possibility that if paroled petitioner could find himself in the same position—involved with a woman, emotionally unstable, and using alcohol to deal with stress. This possibility is certainly "rationally indicative of the inmate's current dangerousness" (*In re Calderon, supra,* 184 Cal.App.4th 670, 690), and thus a valid basis for the Board's conclusion that petitioner was "not suitable for parole because he poses . . . a threat to public safety if released from prison." Although, as noted by the Board, the record is replete with proof of the substantial gains made by petitioner, there is "some

evidence" to support the Board's decision. (Pen. Code, § 3041, subd. (b); regulation 2402(a); *In re Lawrence*, *supra*, 44 Cal.4th 1181, 1228; *In re Shaputis*, *supra*, 44 Cal.4th 1241, 1260-1261; *In re Shippman*, *supra*, 185 Cal.App.4th 446, 458-460.)

At the conclusion of the hearing, the Board advised petitioner he would be eligible for another hearing in three years, in accordance with Penal Code section 3041.5, subdivision (b). Petitioner contends that this statute, amended in 2008, "increased the minimum parole denial period from one year, the limit at the time of his conviction in 1979, to three years," thereby violating his "state and federal constitutional protections against *ex post facto* laws." This issue appears to be raised for the first time here, but, because it presents a pure issue of law not dependent upon contested issues of fact, we shall address it. (See *Batt v. City and County of San Francisco* (2010) 184 Cal.App.4th 163, 175-176.)

Petitioner's reliance upon *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, and *Garner v. Jones* (2000) 529 U.S. 244 is puzzling, because *Morales* rejected an ex post facto challenge to a predecessor version of Penal Code section 3041.5. The following discussion by our Supreme Court demonstrates why petitioner's contention is not aided by the cited decisions:

"In *Morales***,** a California law allowed the parole board, after holding an initial hearing, to defer subsequent parole suitability hearings up to three years for inmates convicted of multiple homicides, provided it found parole was not reasonably likely to occur sooner. ([*California Dept. of Corrections v. Morales*, *supra*, 514 U.S. 499,] 503.) Finding no retroactive increase in punishment, the high court emphasized that there had been no change in the applicable indeterminate term, in the formula for earning sentence reduction credits, or in the standards for determining either the initial date of parole eligibility or the prisoner's suitability for parole. (*Id*. at p. 507.) . . . At bottom, no ex post facto violation occurred because the risk of longer confinement was 'speculative and attenuated' (*id*. at p. 509), and because the prisoner's release date was essentially 'unaffected' by the postcrime change. (*Id*. at p. 513; cf. *Garner v. Jones*[, *supra*,] 529 U.S. 244, 255 [concluding that new Georgia rule allowing up to eight years between

parole hearings for life prisoners did not necessarily increase confinement, and remanding to determine whether rule created 'significant risk' of greater punishment 'as applied' in that case].)" (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 182; see *In re Rosenkrantz*, *supra*, 29 Cal.4th 616, 650.)

Petitioner's ex post facto claim fails for the same reasons set out in *In re Brown* (2002) 97 Cal.App.4th 156, 160: "The amendments resulting in the current version of section 3041.5 effect no change in petitioner's crime. Nor do they increase sentences statutorily assigned to the crime of [second degree] murder. Only the administrative method by which a parole release date is set has been altered and as such, . . . is proper."

Two other points require brief mention. First, petitioner plants the suggestion in his petition that he was "required" by the Board "to 'remember' specific details of the offense." An inmate cannot be compelled to discuss the circumstances of the commitment offense or to admit guilt in order to be found suitable for parole (Pen. Code, § 5011; Cal. Code Regs., tit. 15, § 2236.) However, there is nothing in the hearing transcript suggesting any sort of coercion was applied to get petitioner—who was represented by counsel—to discuss his wife's murder. Second, petitioner believes the Board's decision is fatally defective because it was announced in the form of petitioner being "a present risk of danger if released." Although the Board's failure to use the operative phrase of regulation 2402(a)—that petitioner would pose "an unreasonable risk of danger to society if released from prison"—was unfortunate, it was not objected to by petitioner's counsel and it cannot be deemed prejudicial because there is absolutely nothing establishing that the Board lost sight of the fundamental nature of the proceeding. Moreover, it seems pointless to order a remand so the Board may restate its decision. (See *In re Criscione* (2009) 180 Cal.App.4th 1446, 1461 ["we are not required to remand due solely to the absence of some pro forma recitation"].)

The petition is denied.

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Richman, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.